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Court Allows Suit Against Nixon, Aides

4-4 Split of Justices Is Halperin Victory

By Lyle Denniston
Washington Star Staff Writer

An evenly split Supreme Court ruled yesterday that former President Richard Nixon may be sued for damages for allowing wiretapping of an aide's home telephone.

The court's action also permits damage lawsuits against former Nixon assistants Henry A. Kissinger and H.R. Haldeman and former Attorney General John Mitchell.

Nixon, Kissinger, Haldeman and Mitchell had been sued in federal court here by Morton Halperin, who was an aide on Kissinger's national security staff during the Nixon administration.

Halperin's home telephone was tapped for 21 months when high officials in the White House suspected him of leaking foreign policy and defense secrets to the press. The existence of the tap was disclosed after the leak of the secret Pentagon Papers in 1971.

A similar wiretap was put on the home telephones of New York Times reporter Hedrick Smith. The legal status of Smith's case against Nixon, and of other damage lawsuits also involving wiretapping during the Nixon administration, remains unclear in the wake of yesterday's action by the court.

The justices, while allowing Halperin's case to go to trial, did not settle the basic constitutional question of whether the president and his closest advisers are immune to such damages when they violate a person's constitutional rights.

In fact, the court announced yesterday that it would review another test case raising that issue directly. That decision will not come until sometime next year.

The new case involves a \$3.5 million lawsuit against Nixon and two other aides by A. Ernest Fitzgerald, who lost his Pentagon job after criticizing overspending on a military airplane.

The two actions by the court yesterday left lawyers somewhat uncertain as to the state of immunity for presidents and their close associates when their official actions intrude on someone's constitutional rights.

Halperin's attorney, Mark Lynch, said of the action: "It's a victory - I think. There could be a lot of confusion down the road."

The court split 4-4 in the Halperin case because one justice had disqualified himself. Justice William H. Rehnquist, who was a Justice Department official in the Nixon administration at the time of the Halperin wiretapping, took no part in the case.

When the court splits 4-4, the result is that a lower court ruling is upheld. The court writes no opinion in such instances.

The 4-4 split technically cleared the way for the trial of lawsuits against Nixon, Kissinger and Mitchell.

In a separate order, the court agreed to let the trial go ahead against Haldeman, too. The court said it had been wrong in even agreeing to hear Haldeman's appeal along with those of Nixon, Kissinger and Mitchell. For Haldeman, however, the result is the same: the lower court ruling against him takes effect, thus permitting the trial.

What that means for Halperin is that he has won the right to have his case go to a trial against Nixon, Kissinger, Haldeman and Mitchell and he has an opportunity at that trial to win damages that could run as high as \$100 a day for the wiretapping.

Nixon and his former aides, at the same time, get the right to try to defend themselves by arguing that the wiretapping was necessary to national security because it involved the gathering of "foreign intelligence."

Kissinger also will have the legal right to argue that he simply was not involved in the wiretapping incident, and thus should have no liability at all.

Previously, Halperin has won a token \$1 in damages against Nixon and his three former associates. Ultimately he might not even win that much if the legal defense that Nixon and his aides now may make succeeds.

While the Halperin case goes forward in a U.S. District Court here, the Supreme Court will be moving ahead with the new appeal involving Fitzgerald's damage claim.

Should the court rule in that case that the president and his close aides are immune to damage lawsuits for their official actions, that might ultimately have the practical affect of wiping out any victory Halperin wins in the new trial of his case.

Even Halperin's lawyers conceded that is a possibility, although they also argued that the court could feel bound in the future by what it decided yesterday in the split decision.

Fitzgerald's case is aimed at former White House assistants Bryce Harlow and Alexander Butterfield, as well as at Nixon.

Rehnquist will presumably participate in that case, because it does not involve Justice Department officials.

There will be another new member of the court by that time - the successor to retiring Justice Potter Stewart.

Because the court never discloses how the individual justices voted when it splits 4-4, it is unknown how Stewart voted in this case.

In a key ruling in 1978 limiting official immunity in general, Stewart voted in favor of immunity, as did Rehnquist.